which has a *quasi*-monopoly in news may be compelled to furnish its product to consumers including communities which have no newspapers belonging to such association, at reasonable rates.[20] The constitutional guaranty of freedom of the press would protect news against too close public control. Mr. Justice Brandeis fears that the courts are not equipped to deal with the problem in all its aspects. But, although public services are often best regulated by administrative bodies, the courts have not for that reason denied the relief at their disposal pending the inauguration of such bodies.[21]

TRESPASS BY AIRPLANE. — The rapid approach of the airplane as an instrumentality of commerce presents the occasion for defining more precisely the doctrine of the ownership of the air space, as embodied in Coke's maxim, *cujus est solum, ejus usque ad coelum*.[1] Examining first the cases which involve interferences with the column of air by encroachments from adjoining lands, we find that not only is the subjacent landowner permitted to cut away as nuisances overhanging shrubbery and projecting cornices,[2] but in some states he may resort to an action in ejectment.[3] That the encroaching landowner is liable also for all foreseeable damage is settled;[4] but whether there is a cause of action

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New York & Chicago Grain & Stock Exchange *v.* Board of Trade, 127 Ill. 153, 19 N. E. 855 (1889); News Publishing Co. *v.* Associated Press, 114 Ill. App. 241 (1904); News Publishing Co. *v.* Associated Press, 190 Ill. App. 77 (1914). See also Friedman *v.* Telegraph Co., 32 Hun (N. Y.) 4 (1884); Smith *v.* Telegraph Co., 42 Hun (N. Y.) 454 (1886). See *contra*, State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91 (1901); Matthews *v.* Associated Press, 136 N. Y. 333, 32 N. E. 981 (1893); Metropolitan Grain & Stock Exchange *v.* Board of Trade, 15 Fed. 847 (1883).

[20] Inter-Ocean Publishing Co. *v.* Associated Press, *supra;* Moore *v.* Southern Railway Co., 136 Ga. 872, 72 S. E. 403 (1911).

[21] Allnutt *v.* Inglis, 12 East, 527 (1810); Shepard *v.* Gold & Stock Telegraph Co., 38 Hun (N. Y.) 338 (1885); Western Union Telegraph Co. *v.* State, 165 Ind. 492, 76 N. E. 100 (1905).

[1] COKE ON LITT., § 4*a*.

[2] Penruddock's Case, 5 Coke Rep. 100 (1598); Baten's Case, 9 Coke Rep. 53 (1611); Lemmon *v.* Webb, [1895] A. C. 1; Smith *v.* Giddy, [1904] 2 K. B. 448; Wandsworth Board of Works *v.* United Telephone Co., 13 Q. B. D. 904, 927 (1884); Codman *v.* Evans, 7 Allen (Mass.), 431 (1863); Aiken *v.* Benedict, 39 Barb. (N. Y.) 400, 402 (1863); McCourt *v.* Eckstein, 22 Wis. 153, 158 (1867); Meyer *v.* Metzler, 51 Cal. 142 (1875); Lawrence *v.* Hough, 35 N. J. Eq. 371 (1882); Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623 (1886); Lyle *v.* Little, 83 Hun (N. Y.), 532, 33 N. Y. Supp. 8 (1895); Tanner *v.* Wallbrunn, 77 Mo. App. 262, 265 (1898); Norwalk Heating & Lighting Co. *v.* Vernam, 75 Conn. 662, 664, 55 Atl. 168 (1903); Harndon *v.* Stultz, 124 Iowa, 440, 100 N. W. 329 (1904); Huber *v.* Stark, 124 Wis. 359, 102 N. W. 12 (1905); Hazle *v.* Turner, 2 Sess. (Scotland) 886 (1840); see also Crocker *v.* Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. Supp. 492 (1901) (swinging shutters).

[3] Murphy *v.* Bolger, 60 Vt. 723, 15 Atl. 365 (1888); McCourt *v.* Eckstein, 22 Wis. 153 (1867); Beck *v.* Ashland Cigar & Tobacco Co., 146 Wis. 324, 130 N. W. 464 (1911); Butler *v.* Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716 (1906) (telephone wires not touching any part of the land). *Cf.* Rasch *v.* Noth, 99 Wis. 285, 74 N. W. 820 (1898); Huber *v.* Stark, 124 Wis. 359, 362, 102 N. W. 12 (1905). *Contra*, Wilmarth *v.* Woodcock, 58 Mich. 482, 486, 25 N. W. 475 (1885); Norwalk Heating & Lighting Co. *v.* Vernam, 75 Conn. 662, 664, 55 Atl. 168 (1903). See 16 YALE L. J. 275.

[4] Pickering *v.* Rudd, 4 Camp. 219, 221 (1815); Fay *v.* Prentice, 1 C. B. 828 (1845) (depreciation in the value of the land); Smith *v.* Giddy, [1904] 2 K. B. 448; Langfeldt *v.* McGrath, 33 Ill. App. 158 (1889); Barnes *v.* Berendes, 139 Cal. 32, 72 Pac. 406

for the mere entry into the air space resulting in no real injury is not so clear. In England there are, in addition to conflicting *dicta* on the exact case of a balloon,[5] irreconcilable statements concerning the encroachment cases.[6] In this country, however, actual damage from the encroachment does not seem to be requisite for a cause of action.[7] The air space, at least near the ground, is almost as inviolable as the soil itself.

On the reasoning of these cases, the aviator would be held a wrongdoer and, therefore, would be liable for all foreseeable damage to the land.[8] This financial responsibility for all the natural consequences of the flight over the land, regardless of the care exercised, may prove so great a burden that it will retard considerably the flow of capital into the airplane service and hamper materially its development. Yet states adopting the doctrine of absolute liability in the conduct of dangerous undertakings might impose that burden at any rate on the aviator. Massachusetts, however, has already provided against such a difficulty by enacting that there be liability only for failure to take every reasonable precaution;[9] and the statute is probably constitutional.[10]

The consequences of the trespass, other than liability for actual

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(1903). *Cf.* Whittaker *v.* Stangvick, 100 Minn. 386, 111 N. W. 295 (1907); Lamprey *v.* Danz, 86 Minn. 317, 90 N. W. 578 (1902). See also cases cited in note 2.

[5] Pickering *v.* Rudd, 4 Camp. 219 (1815) (Lord Ellenborough refused to hold that an overhanging board was a trespass, for it would follow that an aeronaut would be liable to an action of trespass *quare clausum fregit*); Kenyon *v.* Hart, 6 B. & S. 249, 252 (1865) (Justice Blackburn saw no legal reason for doubting that it would be a trespass). See HAZELTINE, THE LAW OF THE AIR, 66; Valentine, 22 JURIDICAL REV. 94; 24 JURIDICAL REV. 321 (note on a French case); Kuhn, 4 AM. JOUR. OF INT. LAW, 124; Blewett Lee, 7 AM. JOUR. OF INT. LAW, 473; Meyer, 36 LAW MAG. AND REV. 17; CLERK AND LINDSELL, TORTS, 6 ed., 362; POLLOCK, TORTS, 10 ed., 363; SALMOND, TORTS, 4 ed., 190; 12 LAW NOTES (Thompson Publishing Company), 108.

[6] Fay *v.* Prentice, 1 C. B. 828 (1845) (damage presumed); Smith *v.* Giddy, [1904] 2 K. B. 448, 451 (if no damage, the plaintiff's only right is to cut back trees). *Cf.* Ellis *v.* Loftus Iron Co., 10 C. P. 10 (1874) (trespass for a horse thrusting his head over a fence); Clifton *v.* Bury, 4 T. L. R. 8 (1887) (firing bullets over land not a technical trespass).

[7] Puortó *v.* Chieppa, 78 Conn. 401, 405, 62 Atl. 664 (1905); Ackerman *v.* Ellis, 81 N. J. L. 1, 79 Atl. 883 (1911); Smith *v.* Smith, 110 Mass. 302 (1872) (projecting eaves are "a wrongful occupation of the plaintiff's land for which he may maintain an action in trespass"); Harrington *v.* McCarthy, 169 Mass. 492, 494, 48 N. E. 278 (1897); McCourt *v.* Eckstein, 22 Wis. 153, 159 (1867); Beck *v.* Ashland Cigar and Tobacco Co., 146 Wis. 324, 327, 130 N. W. 464 (1911); Hannabalson *v.* Sessions, 116 Iowa, 457, 90 N. W. 93 (1902) (leaning on a fence so that an arm extends over is a trespass); Butler *v.* Frontier Telephone Co., 186 N. Y. 486, 491, 79 N. E. 716 (1906) ("the law regards the empty space as if it were a solid inseparable from the soil and protects it from hostile occupation accordingly." The owner has "the right to the exclusive possession of that space which is not personal property but a part of the land"). *Contra*, Grandona *v.* Lovdal, 78 Cal. 611, 618, 21 Pac. 366 (1889); Countryman *v.* Lighthill, 24 Hun (N. Y.) 405 (1881); Murphy *v.* Bolger, 60 Vt. 723, 727 (1888). See COOLEY, TORTS, 3 ed., 1177; 18 CASE AND COMMENT, 119.

[8] See POLLOCK, TORTS, 10 ed., 30. *Cf.* Guille *v.* Swan, 19 Johns. (N. Y.) 381 (1822) (descending balloonist liable for trespasses by a crowd that gathered to aid him); Canney *v.* Rochester, etc. Ass'n, 76 N. H. 60, 79 Atl. 517 (1911); Scott's Trustees *v.* Moss, 17 Sess. (Scotland) 32 (1889).

[9] MASS. ACTS 1913, chap. 663. *Cf.* CONN. PUBLIC ACTS, 1911, chap. 86 (which imposes absolute liability). See also 146 L. T. 105 (December 14, 1918), for a summary of the report of the Civil Aerial Transport Committee which recommends that Parliament establish absolute liability as the standard.

[10] Sawyer *v.* Davis, 136 Mass. 239 (1884); Commonwealth *v.* Parks, 155 Mass. 531, 30 N. E. 174 (1892).

damage, need concern the aviator but little. A litigious owner will find it expensive seeking nominal damages, especially where statutes make costs at law discretionary.[11] Further, he will be an ingenious landowner who can keep the trespassing airplane off without seriously endangering the aviator's life; whatever means he employs will be far from reasonable.[12] Then, too, there will be practically no basis for an injunction to prevent the repeated trespasses, since the sum total of the damage would be nominal and the danger of an easement's arising the slightest, when we consider the difficulty of establishing twenty years' adverse user of a particular lane at a fixed height as well as within a certain width.[13]

If we rigorously apply Coke's maxim, the result is that the law will frown upon the aviator, but unless he causes actual damage it will connive at the formal wrong. This branding of the inoffensive aviator as a tortfeasor, even if only in form, may be an embarrassing annoyance to one who acclaims the elasticity of the common law. Fortunately there are no binding decisions which stamp the aviator a trespasser; and of the cases adopting Coke's maxim unqualifiedly it may be said that the particular situation of a passage by an airplane was not considered. They have, then, only an inferential bearing on our problem, so that the courts may feel free to invoke general principles and practical considerations in balancing the interest of the aviator in the unrestrained development of a beneficial enterprise and that of the landowner in the free use of his superincumbent air space.

During the past decade foresighted lawyers have been discussing the problem, and several have ventured a theory upon which the balance should be struck. It has been suggested that although, according to the maxim, the landowner does own the air space up to the heavens, there is also a right of public passage, as long as the enjoyment of the landowner is not interrupted; a situation similar to the right of passage over navigable rivers privately owned.[14] The similarity, however, is slightly incomplete, for on rivers it is the navigator who is not to be interfered with by the bed-owner; [15] here, the owner is to be left undisturbed.

Another theory construes Coke's maxim as securing to the landowner only a right of user, and maintains that the aviator is within the circle of law-abiding citizens, until he causes actual damage.[16] This doctrine, however, imposes absolute liability for any interference with the landowner's use.

A third doctrine asserts that "the scope of possible trespass is limited by that of effective possession,"[17] just as possession is at the basis of pro-

[11] See BLISS, N. Y. ANN. CODE, §§ 3228, 3230 (if the defendant does not dispute plaintiff's ownership).

[12] See 36 LAW MAG. AND REV. 20.

[13] *Cf.* Corbett *v.* Hill, 9 Eq. Cas. 671 (1870) (the owner of the soil may build over a window projecting rightfully); Keats *v.* Hugo, 115 Mass. 204, 217 (1874) (similarly as to eaves).

[14] Valentine, 22 JURIDICAL REV. 86, 96; HAZELTINE, THE LAW OF THE AIR, 77.

[15] See GOULD, WATERS, §§ 88–89.

[16] HAZELTINE, THE LAW OF THE AIR, 57; Blewett Lee, 7 AM. JOUR. OF INT. LAW, 474; 51 SOLICITOR'S JOURNAL, 771; SALMOND, LAW OF TORTS, 4 ed., 190; 1 WIGMORE, SELECT CASES ON THE LAW OF TORTS, 560.

[17] POLLOCK, TORTS, 10 ed., 363.

prietary rights in land, so is it the basis of any proprietary right in the air space.[18] The passage at a high altitude is, then, not a trespass. But there is liability for all interferences with the air effectively possessed.

Although the flight of an airplane will very likely not be held a tort, the common law seems to afford no basis for holding the aviator liable only for negligence. If the burden of absolute liability for injuries to the land tends to check the growth of the airplane industry, we must look to the legislatures for relief. It is to be observed, however, that a duty of due care under the circumstances surrounding travel by airplane is practically as burdensome as absolute liability.

RECENT CASES

ADMIRALTY — MARITIME LIEN — SUPPLIES FURNISHED TO VESSEL — CONSTRUCTION OF STATUTE. — A federal statute provides that any person furnishing supplies to any vessel should have a maritime lien. (ACT, JUNE 23, 1910, c. 373, § 1, 60 STAT. 604.) Pursuant to contract the libellant delivered coal to A's wharf with the understanding that A use a large part for his vessels, and that the libellant have a maritime lien therefor. A did appropriate a large part to various vessels, and the libellant now seeks to enforce a maritime lien against a *bonâ fide* purchaser on each vessel for the amount each vessel had used. *Held*, that no maritime lien had been created, as the coal had not been furnished to any particular vessel, appropriation by the owner being insufficient. *The Walter Adams*, 253 Fed. 20 (C. C. A. 1st Circ.).

Prior to the statute, although there was a conflict, the prevailing view, independent of local statutory provisions, was that no maritime lien was created unless the supplies were put on board, or brought within the immediate presence and control of the officers of the particular ship. *The Vigilancia*, 58 Fed. 698; *The Cimbria*, 156 Fed. 383. See Smith, "New Federal Statute Relating to Liens on Vessels," 24 HARV. L. REV. 182, 200. The statute in the principal case does not define "furnishing . . . to a vessel," and, as the statute is remedial, it should be construed liberally. *Wall* v. *Platt*, 169 Mass. 398, 48 N. E. 272; *Robinson* v. *Harmon*, 157 Mich. 276, 122 N. W. 106. Such interpretation, however, is applied only to the extent of effectuating the purpose of the enactment. *Hudler* v. *Golden*, 36 N. Y. 446, 447. In the present case the apparent purpose was to do away with the existing confusion and conflict. Beyond this it should not be construed, especially as creditors and *bonâ fide* purchasers may be prejudiced. *Vandewater* v. *Mills*, 19 How. (U. S.) 82, 89; *The Cora P. White*, 243 Fed. 246, 248. Accordingly, it seems that the act merely codifies the prior prevailing view which required a delivery to and for a specific vessel. *The Cora P. White, supra; Astor, etc. Co.* v. *White, etc. Co.*, 154 C. C. A. 246, 241 Fed. 57. *Cf. The Yankee*, 147 C. C. A. 593, 233 Fed. 919.

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — UNAVOIDABLE DESTRUCTION OF RECORD BY FIRE. — A judgment was rendered in the lower court against the defendant, and in due time he filed his appeal. Before he could make out his bill of exceptions based on voluminous evidence and certain exceptions taken during the trial, the courthouse, containing the records and the official stenographer's notes, was destroyed by fire. *Held*, on appeal, that a new trial be granted. *Woods* v. *Bottmos*, 206 S. W. 410 (Mo.).

By the weight of authority, if, without the appellant's fault, the transcript

[18] HAZELTINE, THE LAW OF THE AIR, 74.